



MULTISTATE TAX COMMISSION

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Nexus Program Director's August 5, 2019 Update on Significant Nexus Law Developments Since April 24, 2019

See PowerPoint concerning states that have enacted economic nexus statutes similar to South Dakota's in *South Dakota v. Wayfair, Inc.*, 585 U.S. ___ (2018), as well as states that have enacted laws requiring marketplace facilitators/providers to collect sales/use tax on facilitated sales.

Other State Legislation

California

The California Legislature enacted SB 92, limiting from eight to three years the back-tax liability for uncollected sales/use taxes for marketplace sellers in the Amazon FBA Program with inventory in the state, if such sellers timely register.

Hawaii

The Hawaii Legislature enacted SB 495, creating a economic nexus standard for corporate income tax: a business making 200 or more transactions into the state annually, or earning \$100,000 or more in gross income from in-state sources, will be presumed to have economic nexus and subject to Hawaii's income tax beginning in tax year 2020.

Oregon

The Oregon Legislature enacted HB 3137, imposing a state transient lodging tax.

New Hampshire

The New Hampshire legislature has enacted SB 242, requiring "foreign jurisdictions" to provide written notice to the New Hampshire Department of Justice prior to enforcing any sales/use tax collection or information reporting obligations on New Hampshire sellers.

Rulings or Administrative Actions

Massachusetts

The Department of Revenue published on 5/7/2019 for comment proposed 830 CMR 63.39.1 providing guidance on state corporate income tax nexus. The proposed regulation incorporates “in-state sales activity” under *Wayfair* as a basis for establishing nexus.

Texas

Texas Comptroller Private Letter Ruling No. 20180228152433 determined that a group of out-of-state entities' activities related to planning and hosting a multiplayer online game tournament in Texas created nexus with this state for sales and use tax and franchise tax purposes. The entities send employees into the state to assist in planning the tournament and in supervising the tournament it.

Cases

Maryland

In *ConAgra Foods RDM, Inc. v. Comptroller of the Treasury*, No. 1940, the Court of Special Appeals of Maryland upheld the Maryland Tax Court's ruling in favor of the Comptroller and against the taxpayer, applying the “lack of economic substance” doctrine to determine that a foreign wholly-owned subsidiary and intellectual property holding company, Brands, of a multi-national producer and marketer of processed foods, ConAgra, lacked economic substance and had sufficient contacts with Maryland to establish the required nexus for the state to impose its corporate income tax.

In *Staples, Inc., et al. v. Comptroller of the Treasury*, Docket No. 19-119, the taxpayer has petitioned for writ of certiorari to the U.S. Supreme Court, challenging as unconstitutional the apportionment formula applied by Maryland (upheld by the Maryland Court of Special Appeals) to tax income from out-of-state entities' royalty receipts derived from sales activity of in-state related business entities. Maryland used the apportionment factors of the in-state related entities. The petition argues that a split exists among state courts on this issue, citing, on the one hand, decisions such as *Comptroller of the Treasury v. SYL, Inc.*, 825 A.2d 399 (Md. 2003) and *Geoffrey, Inc. v. South Carolina Tax Commission*, 437 S.E.2d 13 (S.C. 1993), and on the other hand, *Griffith v. ConAgra Brands, Inc.*, 728 S.E.2d 74 (W.Va. 2012) and *Scioto Ins. Co. v. Oklahoma Tax Commission*, 279 P.3d 782 (Okl. 2012). All of these decisions involved the question of income tax nexus for intangibles holding companies. Although the taxpayer admitted nexus with Maryland in this case and apportionment seems to be the issue, the purported conflict among state jurisdictions that the petition attempts to raise warrants close watching of this matter.

Massachusetts

In *Blue Nile, et al. v. Massachusetts Department of Revenue*, the Massachusetts Superior Court in Suffolk County granted the Department's motion, dismissing without prejudice a lawsuit by six remote sellers challenging the constitutionality state's "cookie nexus" regulation, determining that the Appellate Tax Board should be the proper forum for the dispute. Another challenge to the regulation remains pending in the Virginia courts in the *Crutchfield* case.

Minnesota

In *Baurley v. Fielding, Trustee*, the U. S. Supreme Court has denied the Minnesota Department of Revenue's petition for certiorari concerning the Minnesota Supreme Court's decision at 916 N.W. 2d 323 (Minn. 2018) determining that Minnesota's taxation of capital gain income from the sale of S corporation stock by a trust violated due process, based on lack of "minimum contacts" between the trust and the state. The S corporation had operations in Minnesota, the grantor was a Minnesota resident, and one of the beneficiaries was a Minnesota resident. However, during the tax year at issue, the trustee was a non-resident, the other beneficiaries were non-residents, and the trust was administered outside the state.

New York

In *Lewis*, New York Division of Tax Appeals, DTA No. 827791 (6/20/2019), the court determined that a nonresident's gain on the sale of New York domestic S corporation stock was considered New York-source income apportionable to New York using the S corporation's business allocation percentage.

North Carolina

In *North Carolina v. Kimberly Rice Kaestner 1992 Family Trust*, No. 18-457, the U.S. Supreme Court has issued its opinion on 6/21/2019, ruling against the North Carolina Department of Revenue, affirming the North Carolina Supreme Court's decision determining that North Carolina's taxation of undistributed trust income of a non-resident trust, based on the beneficiary being a North Carolina resident, violated due process and lacked "minimum contacts." The trustee was a non-resident, the trust was administered outside the state, and the trust assets (intangibles) were located outside the state.

Amnesty

Alabama

HB 183 grants amnesty to remote sellers participating in the Simplified Sellers Use Tax Remittance (SSUT) Program for any uncollected remote use tax (including penalties and interest) that may have been due on sales made to purchasers in Alabama for all periods prior to October 1, 2019. Previously, the amnesty applied for the 12-month period prior to the eligible seller's participation in the program. This law also provides such sellers protection from class action lawsuits.

Illinois

SB 689 includes an amnesty program for certain taxes administered by the Department of Revenue due after June 30, 2011 and prior to July 1, 2018 and paid during the period October 1 to November 15, 2019. Interest and penalties can be abated.

Congress and Other Federal Activities

Senators Tester (MT), Merkley (OR), Hassan (NH), and Shaheen (NH) introduced in the U.S. Senate on June 28, 2018 S. 3180 (**re-introduced 1/16/19**), the "Stop Taxing Our Potential Act of 2018," which would essentially codify *Quill*. The senators represent states that do not impose sales tax. These senators also introduced the "Online Sales Simplicity and Small Business Relief Act" on **July 31, 2019** (a re-introduced version of S. 3725, introduced in late 2018), which would prohibit states from retroactively require remote sellers to collect sales/use tax on sales prior to the *Wayfair* decision, also prohibit states from imposing sales/use tax collection duties on remote sellers until January 1, 2021. The act would include a "small remote seller" exception for remote sellers with annual U.S. sales of \$10 million or less, and prohibit states from imposing sales/use tax collection duties on them until 30 days after states had adopted a Congressionally approved compact including required sales tax simplification provisions.

Representatives Gibbs (OH) and Wilson (SC) introduced the Protecting Businesses from Burdensome Compliance Cost Act of 2018 (H.R. 6724) on September 6, 2018 (**re-introduced as H.R. 379 1/9/19**), which imposes a moratorium on enforcement of *Wayfair* until January 1, 2020, and prohibits local jurisdictions from requiring collection or reporting by remote sellers. It also imposes certain restrictions on local rates.

Representatives Sensenbrenner (WI), Eshoo (CA), Duncan (SC) and Lofgren (CA) introduced the Online Sales Simplicity and Small Business Relief Act of 2018 (H.R. 6824) on September 13, 2018 (**re-introduced in March 2019**). The bill prohibits

retroactive enforcement of *Wayfair*, imposes a small business remote seller exemption of \$10 million or less in annual gross national sales, and prohibits states from enforcing *Wayfair* until they have entered into a compact approved by Congress providing for certain simplification measures for sales tax administration.

Representatives Chabot (OH) and Scott (VA) have re-introduced the Business Activities Tax Simplification Act of 2019 (BATSA), H.R. 3063, in June 2019. The bill is similar to prior versions of the BATSA, restricting states' ability to tax multistate businesses and significantly expanding the Congressional pre-emption of state taxing power contained in P.L. 86-272 (15 U.S.C. Section 381 et. Seq.).

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